STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 1, 2007
v	No. 264991 Eaton Circuit Court
CARRIE EVERETT COTTRELL, Defendant-Appellant.	LC No. 04-020431-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was found guilty by a jury of possession of 50 grams or more, but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as a second controlled substances offender, MCL 333.7413(2), to 99 to 480 months on the cocaine conviction and 24 to 48 months on the marijuana conviction. He appeals as of right. We affirm defendant's convictions, but remand for correction of the sentence for the marijuana possession conviction. This case has been decided without oral argument under MCR 7.214(E).

Defendant first argues the trial court should have granted his motion for a new trial on the ground that the jury's verdict had been affected by an extraneous influence. Specifically, defendant asserts that a juror told other jurors she had seen defendant on a "*Most Wanted*" style television broadcast.[1] According to defense counsel, one juror stated, after the verdict, that she had seen defendant on "Lansing's most wanted television show," that she recognized him from that broadcast on the first day of trial, and that she had shared this information with other jurors. Defendant produced affidavits about these statements from defense counsel and from the trial judge's law clerk, who had been present during defense counsel's post-trial discussion with the jurors. However, these affidavits relate to statements allegedly made by jurors, and as such they are plainly hearsay. Although we are appalled by the prospect of such a potentially prejudicial conversation amongst the jurors, we have no competent record evidence, such as affidavits from the jurors themselves, to confirm that the alleged conversation actually took place.

[1] We note that defendant was never on such a show.

Hearsay evidence is incompetent to establish an improper extraneous influence on the jury, *People v Budzyn*, 456 Mich 77, 92 n 14; 566 NW2d 229 (1997), and the trial court therefore did not abuse its discretion by denying defendant's motion for a new trial. See *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Defendant next argues he was denied the effective assistance of counsel when his trial counsel failed to request an instruction on the lesser included offense of simple possession of a lesser amount of cocaine because the testimony at trial indicated some discrepancy in the amount of drugs seized from defendant. We disagree. To succeed on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced by that substandard performance. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). There is a strong presumption in favor of finding that counsel's performance was adequate and if the alleged omission can be construed as part of a reasonable trial strategy, defendant's claim will fail. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003).

The defense theory of the case at trial was that defendant's girlfriend had slipped the drugs into defendant's pocket without his knowledge. Defendant's girlfriend testified that the amount of drugs was about two ounces. If defense counsel had requested an instruction regarding a smaller amount of drugs, it would have indicated to the jury that the girlfriend's testimony was not to be believed and thus undermined the defense theory of the case.

Additionally, an instruction on possession of a smaller amount of drugs would not be consistent with the facts as presented at trial. The laboratory technician testified that he measured a total of 50.87 grams of the material he determined to be cocaine. Defendant admitted he told police that he had about two ounces of cocaine at the time of his arrest. In light of this evidence of the amount of cocaine involved, trial counsel could reasonably have feared that challenging the amount would have undermined the credibility of the defense before the jury. Thus, defendant has not established that trial counsel's performance was deficient.

Finally, defendant argues, and the prosecution concedes, that he was improperly sentenced on his possession of marijuana conviction. The pertinent statutes in assessing defendant's sentence on that charge are MCL 333.7403(2)(d) and MCL 333.7413(2). MCL 333.7403(2)(d) provides: "A person who violates this section as to … [m]arihuana is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both." The statute under which defendant's sentence was enhanced, MCL 333.7413(2), provides that "an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both." These two sections, when read in conjunction with each other, provide for a maximum enhanced sentence of 24 months. Thus, defendant's maximum sentence for the possession of marijuana conviction should be reduced to 24 months. As to defendant's minimum sentence for that conviction, we conclude from the trial court's initial statement at sentencing that it actually intended to impose a one year, or in other words a 12-month, minimum sentence. Accordingly, we conclude that defendant's possession of marijuana sentence should be reduced to a 12- to 24-month prison sentence. We note that a resentencing hearing is unnecessary for this ministerial correction of the judgment of sentence. See *People v Maxson*, 163 Mich App 467, 471; 415 NW2d 247 (1987).

We affirm defendant's convictions but remand to the trial court for correction of his sentence for possession of marijuana. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper